A

Tetuan Bakar & Partners v Malaysia National Insurance Bhd & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–289 OF 2006
TENGKU BAHARUDIN SHAH, ZALEHA ZAHARI AND ZAINUN ALI JJCA
9 FEBRUARY 2010

C

Arbitration — Award — Setting aside — Appeal against — Malaysian Bar Professional Indemnity Insurance Scheme — Dispute on quantum of indemnity payable — Terms and conditions of insurance policy — Construction of — Whether parties entered into 'claims-made' or 'occurrence-based' policy — D *Arbitration Act 1952 s 24(2)*

Insurance — Professional liability policy — Liability of insurers — Malaysian Bar Professional Indemnity Insurance Scheme — Dispute on quantum of E *indemnity payable — Terms and conditions of insurance policy — Construction of*

Legal Profession — Advocates and solicitors — Professional negligence — Insurance coverage against civil liability — Malaysian Bar Professional F *Indemnity Insurance Scheme Indemnity limit of RM2m in first term of insurance extended to RM7m for second and third terms — Professional negligence during currency of first term — Dispute on quantum of indemnity*

G The present appeal ('the first appeal') was related to the second appeal. The first appeal was directed against the decision of the High Court in setting aside and varying the arbitration award, made in favour of the appellants, while the second appeal was directed against the dismissal to enforce the said award. The respondents participated in the Malaysian Bar Professional H Indemnity Insurance Scheme ('the scheme') as required under the Legal Profession Act 1976. The policies ranged from 1 July 1997 to 30 June 1998 ('the first period'), 1 July 1998 to 30 June 1999 ('the second period') and 1 July 1999 to 31 December 2000 ('the third period'). In these various periods, a conglomerate of companies participated in the scheme in varying I proportions. The liability of the participating insurance companies varied from one period to another. Antah Sedgwick Insurance Brokers Sdn Bhd ('Antah') was appointed to act as brokers in respect of certification of the insurance, whilst Cunningham Toplis (M) Sdn Bhd ('Cunningham') was appointed as loss adjusters with respect to any claim made under a certificate

of insurance. The appellant was insured for an indemnity limit of RM2m for the first insurance term. For the second and third term, the amount for which the appellant was insured was for an indemnity limit of RM7m. The contractual terms and conditions for all the three terms were the same. During the currency of the first term of the policy, the appellant was retained to act for Tenaga Nasional Bhd ('TNB'), the defendant in respect of a suit between *Prorak Sdn Bhd and Raja Lope & Tan Co v Tenaga Nasional Bhd* ('the KL suit'). By reason of the failure of the appellant's lawyer to be punctual in court, a judgment in default was entered against TNB. An application to set aside the default judgment against TNB was then filed. The appellant's lawyer again failed to be punctual at the hearing of the application to set aside the default judgment and this resulted in the application to set aside the default judgment against TNB being struck out. The appellant's application to reinstate the application to set aside the default judgment against TNB was, however, dismissed by the High Court. The appellant's further appeal to the Court of Appeal was also dismissed. The appellant's application for leave to appeal to the Federal Court against the Court of Appeal decision was refused by the Federal Court. TNB subsequently issued a letter of demand to the appellant demanding the sum of RM9,740,720.48, being the judgment sum paid to the plaintiff in the KL suit. The appellant then made a claim for the same against the insurers, the respondents. The matter was then referred to arbitration to determine the quantum of indemnity payable. The arbitrator was of the opinion that there must be a final judgment before the requirement to notify the respondents under the policy arose. The arbitrator's finding was that the appellant's letter dated 18 June 1998 addressed to Antah was a letter for the purpose of renewal and premium payable for an increment of indemnity and not a notification under cl 5.1.2 of the policy. The appellant therefore was entitled, on the basis of 'claims-made policy' and in the context of conditions 5.1.3 of the insurance policy to an indemnity of RM7m under the third policy period. The respondents applied to the High Court to set aside the arbitrator's award while the appellant applied to enforce the said award against the three insurers who participated in the scheme during the third period. The trial judge held that the arbitrator had misconstrued cll 5.1.1, 5.1.2 and 5.1.3 of the insurance policy and allowed the respondents' application to set aside the arbitrator's award, holding that the appellant was entitled to an indemnity of RM2m under the first term of the policy. Consequently, the appellant's application to enforce the arbitrator's award was dismissed. Hence, the present appeals by the appellant. The issue considered was whether the learned High Court judge had correctly decided to set aside the award of the arbitrator on the grounds that there was an error of law on the face of the award amounting to misconduct.

Held, allowing the appeals with costs here and below:

(1) (per **Zainun Ali and Tengku Baharudin Shah JJCA**) This court agreed

with the views of the arbitrator who had viewed condition 5 in its entirety and decided that condition 5.1.3 inclined heavily towards the conclusion that the policies in this appeal were 'claims-made' rather than 'occurrence-based'. Further, cl 4.4 of the policy also strengthened the position that the parties had entered into a 'claims-made' and not 'occurrence-based' insured policy (see paras 116 & 122).

(2) (per **Zainun Ali and Tengku Baharudin Shah JJCA**) Insofar as the arbitrator was concerned, even though the acts of professional negligence committed by the lawyer in the TNB case were committed during the currency of the first policy, this gave rise to a potential claim under condition 5.1.2 and, subsequently, a claim for indemnity was notified under the third policy under condition 5.1.1 and thus, the appellant should be indemnified under the third policy (see para 130).

(3) (per **Zainun Ali and Tengku Baharudin Shah JJCA**) The interpretation and construction given by the arbitrator was well within his term of reference as arbitrator; albeit, when the questions were specific questions of law, and reading these with conditions 4.4 and 5.1.3 of the policy, his interpretation of it being a 'claims-made' as opposed to an 'occurrence-based' policy was in order. Therefore, if the said award was in order, correct and proper, it should attract a minimum level of judicial interference (see paras 131–132).

(4) (per **Zainun Ali and Tengku Baharudin Shah JJCA**) There was nothing in the respondents' case which suggested that the learned arbitrator had committed any impropriety or wrongdoing. In fact, the allegation of misconduct by the learned arbitrator was a grave issue and would be sustained only in very narrow and drastic circumstances. The grounds pleaded by the respondent in the notice of appeal did not constitute misconduct as provided for under s 24(2) of the Arbitration Act 1952 (see paras 150 & 153).

(5) (per **Zaleha Zahari JCA, dissenting**) The appellant's letter dated 18 June 1998 to Antah was not merely intended as a renewal of the insurance policy and an application for an increased indemnity from RM2m to RM7m, but also as notification of a claim which the appellant had reason to expect may give rise to a claim against them (see para 204).

(6) (per **Zaleha Zahari JCA, dissenting**) The award of the arbitrator for RM7m appeared to be in respect of the policy under the third term of insurance which had three insurers. In making the award, it would appear that the arbitrator had exonerated five of the insurers who did not participate in the scheme in the third period but had failed to award them costs. This demonstrated an 'irregularity of action which is not consonant with the general principles of equity and good conscience'.

This also constituted an error of law appearing on the face of the record entitling the award to be set aside (see para 206).

[Bahasa Malaysia summary

Rayuan ini ('rayuan pertama') adalah berkaitan dengan rayuan kedua. Rayuan pertama diarahkan terhadap keputusan Mahkamah Tinggi mengetepikan dan menukar award timbang tara, yang dibuat memihak kepada perayu-perayu. Rayuan kedua adalah terhadap penolakan pelaksanaan award tersebut. Responden-responden mengambil bahagian dalam Skim Insurans Indemniti Profesional Badan Peguam Malaysia ('skim tersebut') seperti yang diperlukan di bawah Akta Profesion Undang-Undang 1976. Polisi-polisi adalah dari 1 Julai 1997 hingga 30 Jun 1998 ('tempoh pertama'), 1 Julai 1998 hingga 30 Jun 1999 ('tempoh kedua') dan 1 Julai 1999 hingga 31 Disember 2000 ('tempoh ketiga'). Dalam tempoh yang berbeza ini, konglomerat syarikat-syarikat mengambil bahagian di dalam skim ini dalam perkadaran yang berbeza. Liabiliti syarikat-syarikat insurans yang mengambil bahagian berbeza dari satu tempoh ke tempoh yang lain. Antah Sedgwick Insurance Brokers Sdn Bhd ('Antah') dilantik untuk bertindak sebagai broker berkaitan dengan pemberian sijil insurans, manakala Cunningham Toplis (M) Sdn Bhd ('Cunningham') dilantik sebagai pelaras kerugian berkaitan dengan apa-apa tuntutan yang dibuat di bawah sijil insurans. Perayu diinsuranskan bagi had indemniti RM2 juta untuk tempoh insurans pertama. Bagi tempoh kedua dan ketiga, jumlah insurans perayu adalah untuk had indemniti RM7 juta. Terma-terma dan syarat-syarat kontrak bagi ketiga-tiga tempoh adalah sama. Semasa berada dalam tempoh pertama polisi tersebut, perayu dilantik untuk bertindak bagi pihak Tenaga Nasional Bhd ('TNB'), defendan dalam guaman di antara *Prorak Sdn Bhd and Raja Lope & Tan Co v Tenaga Nasional Bhd* ('guaman KL'). Disebabkan oleh kegagalan peguam perayu hadir pada masa yang ditetapkan di mahkamah, penghakiman ingkar terhadap TNB telah difailkan. Peguam perayu sekali lagi gagal untuk hadir pada masa yang ditetapkan semasa perbicaraan permohonan untuk mengetepikan penghakiman ingkar tersebut dan ini menyebabkan permohonan untuk mengetepikan penghakiman ingkar terhadap TNB dibatalkan. Permohonan perayu untuk memasukkan semula permohonan untuk mengetepikan penghakiman ingkar terhadap TNB, walau bagaimanapun telah ditolak oleh Mahkamah Tinggi. Rayuan lanjut perayu ke Mahkamah Rayuan juga ditolak. Permohonan perayu untuk kebenaran merayu ke Mahkamah Persekutuan terhadap keputusan Mahkamah Rayuan dinafikan oleh Mahkamah Persekutuan. TNB kemudian mengeluarkan surat tuntutan kepada perayu menuntut jumlah RM9,740,720.48, iaitu jumlah penghakiman yang dibayarnya kepada plaintif dalam guaman KL. Perayu kemudian membuat tuntutan jumlah tersebut terhadap penginsurans, responden-responden. Perkara tersebut kemudian dirujuk kepada timbang tara untuk pemutusan kuantum indemniti yang perlu dibayar. Penimbang tara berpendapat bahawa harus terdapat keputusan muktamad sebelum

keperluan untuk pemberitahuan kepada responden-responden di bawah polisi timbul. Dapatan penimbang tara adalah bahawa surat perayu bertarikh 18 Jun 1998 kepada Antah adalah surat yang bertujuan untuk membaharui dan premium yang perlu dibayar untuk penambahan indemniti dan bukan notis di bawah klausa 5.1.2 polisi tersebut. Perayu-perayu oleh itu berhak, atas dasar 'claims-made policy' dan di dalam konteks syarat 5.1.3 polisi insurans bagi indemniti sejumlah RM7 juta di bawah tempoh polisi ketiga. Responden-responden, memohon ke Mahkamah Tinggi untuk mengetepikan award penimbang tara sementara pemohon memohon untuk melaksanakan award terhadap ketiga-tiga penginsurans yang mengambil bahagian di dalam skim tersebut semasa tempoh ketiga. Hakim bicara memutuskan bahawa penimbang tara telah salah tanggap klausa-klausa 5.1.1, 5.1.2 dan 5.1.3 polisi insurans tersebut dan membenarkan permohonan responden-responden untuk mengetepikan award penimbang tara, menyatakan bahawa perayu berhak untuk indemniti sejumlah RM2 juta di bawah tempoh pertama polisi. Dengan itu, permohonan perayu untuk pelaksanaan award penimbang tara ditolak. Maka, rayuan-rayuan ini oleh perayu. Isu untuk dipertimbangkan di sini adalah sama ada hakim Mahkamah Tinggi yang bijaksana telah dengan betul memutuskan untuk mengetepikan award penimbang tara atas alasan bahawa terdapat kekhilafan dari segi undang-undang yang jelas dalam award yang menjurus kepada salah laku.

Diputuskan, membenarkan rayuan-rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) (oleh **Zainun Ali dan Tengku Baharudin Shah HHMR**) Mahkamah ini bersetuju dengan pendapat penimbang tara yang mentafsir syarat 5 secara keseluruhannya dan memutuskan bahawa syarat 5.1.3 lebih memihak kepada kesimpulan bahawa polisi-polisi di dalam rayuan ini adalah 'claims-made' dan bukan 'occurrence-based'. Selanjutnya, klausa 4.4 polisi juga menguatkan kedudukan bahawa pihak-pihak telah memasuki polisi insurans 'claims-made' dan bukan 'occurrence-based' (lihat perenggan 116 & 122).

(2) (oleh **Zainun Ali dan Tengku Baharudin Shah HHMR**) Setakat yang diambil berat oleh penimbang tara, walaupun tindakan kecuaian profesional yang dilakukan oleh peguam di dalam kes TNB dilakukan semasa dalam tempoh pertama polisi, ia memberikan potensi tuntutan di bawah syarat 5.1.2 dan, kemudian, tuntutan untuk indemniti telah diberitahu di bawah polisi ketiga di bawah syarat 5.1.1 dan oleh demikian, perayu perlu diberi indemniti di bawah polisi ketiga (lihat perenggan 130).

(3) (oleh **Zainun Ali dan Tengku Baharudin Shah HHMR**) Pentafsiran yang diberikan oleh penimbang tara adalah dalam rangkuman terma

rujukannya sebagai penimbang tara; oleh itu, apabila persoalan-persoalan tersebut adalah persoalan mengenai undang-undang yang spesifik, dan membaca syarat-syarat 4.4 dan 5.1.3 polisi tersebut, pentafsirannya sebagai polisi 'claims-made' berbanding dengan 'occurrence-based' adalah betul. Oleh itu, jika award tersebut dalam keadaan yang betul, dan wajar, ia sepatutnya membolehkan takat campur tangan kehakiman yang minimum (lihat perenggan 131–132).

(4) (oleh **Zainun Ali dan Tengku Baharudin Shah HHMR**) Tidak ada apa-apa di dalam kes responden yang menyarankan bahawa penimbang tara yang bijaksana telah melakukan apa-apa kesalahan atau salah laku. Sebenarnya, dakwaan salah laku oleh penimbang tara adalah isu yang berat dan hanya boleh diterima dalam keadaan yang terbatas dan mendadak. Alasan-alasan yang dirayu oleh responden di dalam notis rayuan tidak membentuk salah laku seperti yang diperuntukkan di bawah s 24(2) Akta Timbangtara 1952 (lihat perenggan 150 & 153).

(5) (oleh **Zaleha Zahari HMR, menentang**) Surat perayu bertarikh 18 Jun 1998 kepada Antah bukan semata-mata diniatkan sebagai membaharui polisi insurans dan permohonan untuk indemniti yang lebih tinggi daripada RM2 juta kepada RM7 juta, tetapi juga sebagai notis untuk tuntutan yang perayu mempunyai sebab untuk menjangka boleh menimbulkan tuntutan terhadap mereka (lihat perenggan 204).

(6) (oleh **Zaleha Zahari HMR, menentang**) Award penimbang tara untuk jumlah RM7 juta kelihatan berkaitan dengan polisi di bawah tempoh ketiga insurans yang mempunyai tiga penginsurans. Dalam memberikan award tersebut, jelas bahawa peimbang tara telah melepaskan lima daripada penginsurans yang tidak mengambil bahagian di dalam skim di dalam tempoh ketiga tetapi gagal untuk mengaward kos kepada mereka. Ini menunjukkan satu 'irregularity of action which is not consonant with the general principles of equity and good conscience'. Ini juga membentuk satu kekhilafan dalam undang-undang yang kelihatan jelas dalam rekod membolehkan award diketepikan (lihat perenggan 206).]

Notes

For a case on liability of insurers, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 349.

For cases on legal profession generally, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1450–2113.

For cases on setting aside, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1366–1427.

Cases referred to

Bill Biakh v Hyundai Corporation [1988] 1 Lloyd's Rep 187 (refd)

Champsey Bhara Co v Jivraj Balloo Spinning & Weaving Co Ltd [1923] AC 480; AIR 1923 PC 66, PC (refd)

Dato' Samsudin Abu Hassan v Robert Kokshoorn [2003] 3 MLJ 331; [2003] 3 CLJ 1, CA (refd)

Exormisis Shipping SA v Oonsoo, the Democratic Peoples Republic of Korea and the Korean Foreign Transportation Corporation [1975] 1 Lloyd's Rep 432, HC (refd)

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428; [1987] CLJ Rep 95, SC (refd)

Hartela Contractors Ltd v Harteco JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)

How Engineering Services Ltd v Lindner Ceilings Floors Partitions plc (1999) 64 Con LR 67, QBD (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)

Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd [1998] 6 MLJ 545, HC (refd)

Moran v Lloyd's (A Statutory Body) [1983] QB 542, CA (refd)

Newton v Bicknell and Bicknell Associates (a firm) [1988] (Transcript Association) 27 September 1988 (refd)

Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co (1993) 99 DLR (4d) 741, SC (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210, HC (refd)

Legislation referred to

Arbitration Act 1952 (repealed by the Arbitration Act 2005) s 24(2)
Arbitration Act 1950 [UK]
Legal Profession Act 1976
Rules of the High Court O 1, O 2 r 3, O 69 r 4

Appeal from: Originating Motion No R2–25–216 of 2003 (High Court, Kuala Lumpur)

Firoz Hussein (Dominic Phutucheary, Cheang Mai and PH Goh with him) (Bakar & Partners) for the appellant.

Cecil Abraham (Rishwant Singh with him) (Shearn Delamore & Co) for the respondents.

Zainun Ali JCA (delivering majority judgment):

[1] The appeal before us W-04–289 of 2006 ('the first appeal') has a related appeal ie Appeal No W-02–1117 of 2006 ('the second appeal'). The first

appeal is against the decision of the High Court, setting aside and varying an arbitration's award dated 9 October 2003. The award was made in favour of the appellants.

[2] The first appeal centres on the issue of whether the High Court had correctly decided to set aside the award of the learned arbitrator on the ground that there is an error on the face of the award.

[3] This is a majority decision. Our view is that the learned High Court judge came to a wrong finding and conclusion. We allowed both appeals with costs. Our reasons are as follows.

FACTUAL BACKGROUND

[4] The appellant is a firm of advocates and solicitors with a practice in Kuala Lumpur. It was established in July 1984.

[5] The respondents are insurance companies. The respondents participated in the Malaysian Bar Professional Indemnity Insurance Scheme and offered insurance coverage for practising advocates and solicitors. By participating in the scheme, advocates and solicitors practising in Malaysia carry approved insurance cover against civil liability arising out of the conduct of such practice as required under the Legal Profession Act 1976 (Act 166 of the laws of Malaysia) ('the Act').

[6] The master policy for the period 1 July 1997 to 30 June 1998 ('the first period') was No DPI 43900246–04. For the period 1 July 1998 to 30 June 1999 ('the second period') was No DPI 43900313–04, whilst the period 1 July 1999 to 31 December 2000 ('the third period') the policy No DPI 43900362–01.

[7] In these various periods, a conglomerate of companies participated in the scheme in varying proportions. A quick look indicates thus:

	Insurance Company	Proportion
(i)	Malaysia National Insurance Sdn Bhd	48.5%
(ii)	Sun Alliance Insurance (M) Sdn Bhd	25%
(iii)	American Home Assurance Co Ltd	12%
(iv)	Hong Leong Assurance Berhad	2%
(v)	Nusantara Worldwide Insurance (M) Sdn Bhd	1%
(vi)	Aetna Universal Insurance Sdn Bhd	2.5%

(vii)	The Malaysian Co-operative Insurance	2%
(viii)	Talasco Insurance Sdn Bhd	1%
(ix)	The People's Insurance (M) Sdn Bhd	5%
(x)	Royal Insurance (M) Sdn Bhd	1%

[8] The number was reduced to eight for the second period in the following proportions:

	Insurance Company	Proportion
(i)	Malaysia National Insurance Sdn Bhd	48.5%
(ii)	Sun Alliance Insurance (M) Sdn Bhd	25%
(iii)	American Home Assurance Co Ltd	12%
(iv)	Zurich Insurance (M) Berhad	10%
(v)	Nusantara Worldwide Insurance (M) Sdn Bhd	1%
(vi)	The Malaysian Co-operative Insurance Society Ltd	1.5%
(vii)	Talasco Insurance Sdn Bhd	1%
(viii)	Royal Insurance (M) Sdn Bhd	1%

[9] It was further reduce to three for the third period in the following proportions:

	Insurance Company	Proportion
(i)	Malaysia National Insurance Sdn Bhd	97.5%
(ii)	The Malaysian Co-operative Insurance Society Ltd	1.5%
(iii)	Talasco Insurance Sdn Bhd	1%

[10] What is apparent in the above list is that there are varying levels of liability of the participating insurance companies from one period to another.

[11] In this appeal, Antah Sedgwick Insurance Brokers Sdn Bhd ('Antah') was appointed to act as brokers in the certification of the insurance. Cunningham Toplis (M) Sdn Bhd ('Cunningham') was appointed as loss adjusters with regard to any claim made under a certificates of insurance.

[12] Thus each member of the Malaysian Bar would be issued their respective certificate of insurance. The appellant in both appeals ie the firm (Bakar & Partners) under Certificates No M97/00275 and T97/00275 were insured for an indemnity limit of RM2m for the first term of insurance.

Though the indemnity limit was extended to RM7m for the second and third term the contractual terms and conditions for all the three terms were the same.

[13] Basically insurance coverage in this appeal relates to three insurance certificates issued by the respondents to the appellant covering the following specific periods. These were:

(a) the first period of insurance from 1 July 1997 to 30 June 1998 was an indemnity for the sum of RM2m vide Insurance Certificate No T97/00275 under Master Policy No DPI 43900246–04;

(b) the second period of insurance from 1 July 1998 to 30 June 1999 was an indemnity for the sum of RM7m vide Insurance Certificate No T98/00275 under Master Policy No DPI 43900313–04; and

(c) the third period of insurance from 1 July 1999 to 31 December 2000 was indemnity for the sum of RM7m vide Insurance Certificate No MT99/00275 under Master Policy No DPI 43900362–01.

[14] In this appeal the appellant firm of advocates and solicitors were retained to act for Tenaga Nasional Bhd ('TNB') in a Kuala Lumpur High Court Suit No D1–22–107 of 1988. TNB was the defendant in the suit, between *Prorak Sdn Bhd and Raja Lope and Tan Co v Tenaga Nasional Bhd* ('the KL suit').

[15] However the appellant's lawyer was not punctual in court, resulting in a default judgment being entered against TNB on 22 July 1997.

[16] The appellant then filed an application to set aside the judgment in default against TNB. Once again, the appellant's lawyer was not punctual at the hearing of the said application to set aside the default judgment on 13 July 1997, thus the application was struck out.

[17] A final bid by the appellant was to file an application to reinstate the application to set aside the default judgment against TNB on 16 September 1997.

[18] However it was dismissed by the High Court with costs on 21 October 1997.

[19] An appeal was lodged by the appellant on 18 November 1997 to the Court of Appeal against the High Court's refusal of its application to reinstate the application to set aside the default judgment.

[20] As a result of the above events, TNB issued a letter dated 20 March 1998 to the appellant alleging negligence. TNB also indicated in the letter that they, TNB, would hold the appellant liable for any payment and damages which it has to pay to the plaintiff in the KL suit as and when the default judgment against them is executed.

[21] Earlier, ie on 3 March 1998, TNB had paid interim payment of RM2,195,248 to the plaintiff in the KL suit (pursuant to the default judgment entered against TNB).

[22] The Court of Appeal on 1 June 1998 dismissed TNB's appeal against the High Court decision refusing reinstatement of the application to set aside the default judgment.

[23] The appellant filed another application in the High Court to set aside the default judgment which was also dismissed on 4 September 1998. The appellant again appealed to the Court of Appeal.

[24] However on 11 October 1999 the Court of Appeal dismissed the appeal against the second application to set aside the default judgment against TNB. The claimant subsequently filed an application for leave to appeal to the Federal Court against the decision of the Court of Appeal.

[25] On 17 January 2000, the Federal Court refused the application for leave to appeal. TNB had to pay the judgment sum of RM9,740,720.48 to the plaintiff, and demanded indemnity for the said amount from the appellant.

[26] Before going to the sequence of events on this appeal it would be instructive to now look at the relevant clauses in the insurance policy. For this purpose we shall confine ourselves to the pertinent clauses only. These are:

> 4. Insuring Clauses
>
> 4.1 On the terms and conditions herein contained and in consideration of the Premium the Insurers shall indemnify the Insured against any Claim first made against any or all of them during the Period of Insurance in respect of any civil liability incurred in the course of the conduct of the Profession by the Practice.
>
> ...
>
> 4.4 All claims first made or deemed to have been first made against all or any of the Insured in one or more Periods of insurance arising from one act or omission or series of acts or omissions attributable to the same underlying cause or event shall be regarded as 'One Claim'. All claims arising out of

Misconduct of one person acting alone or in collusion with others shall be regarded as attributable to one underlying cause and accordingly deemed to constitute 'One Claim'.

5. General Conditions

5.1 1. The practice shall ensure that Notice is given as soon as practicable of any claim made against the insured during the Period of Insurance which may form the subject of indemnity under this Insurance or of the receipt of any intimation of an intention to make a claim against the Insured.

2. Notice shall also be given of any matter event or circumstance of which the insured shall become aware during the Period of Insurance and which may reasonably be expected to give rise to a claim against the Insured.

3. Any claim arising from any matter event or circumstance of which Notice has been given in accordance with General Condition 5.1.1 or 5.1.2 shall be regarded as claim first made during the Period of Insurance in which such Notice was given.

5.2 Notice in terms of General Conditions 5.1 shall be given in writing or by Tested Telex or Tested Facsimile to:

Cunningham Toplis (Malaysia) Sdn Bhd
Box 35
10th Floor
Menara TR
161B Jalan Ampang
50450 Kuala Lumpur
Telephone No 03-261 7188
Facsimile No 03-261 8012

…

SPECIAL PROVISIONS

7.1 Innocent Non-Disclosure

The Insurers shall not exercise their right to avoid this insurance on the grounds of a failure on the part of the Named Insured at inception or at any renewal thereof to disclose facts material to the assessment of risk or on the grounds of an incorrect representation of a kind likely to have materially affected the assessment of risk hereunder.

7.2 Save in the case of non-payment of the Premium by subject to General Conditions 5.3 and 5.10 the insurers will not seek to resile from the contract or to avoid any claim on the grounds of breach of or non-compliance with the terms.

PROVIDED that

1. the Named insured shall establish on a reasonable balance of probability that the alleged non-disclosure or misrepresentation was innocent and free from fraudulent conduct or intent on their part.

2. the Insurers may at their discretion adjust the Premium and other terms of this insurance to those which would have applied had such fat or circumstance been disclosed.

3. where the Insurers should have been notified during a preceding Period of insurance of a claim made against the Insured or of an event or circumstance which could have been reasonably expected to give rise to such a claim and the indemnity to which the Insured would have been entitled was in any way more restricted than that obtaining at the date of notification the Insurers shall be liable only to the extent applicable during such preceding Period of Insurance.

[27] As it turned out, the appellant's policy for the first term of insurance was schedule to expire on 30 June 1998. Antah in its letter of 20 May 1998 to the appellant invited the latter to renew their policy for another 18 months beginning on 1 July 1998 and expiring on 31 December 1998.

[28] In the same letter, Antah wrote asking the appellant to report all claims they were aware of or ought to be aware of with the current insurance (ie before 30 June 1998). The appellant was also required to report all circumstances within the current year of insurance of which they were aware of or ought to be aware of, which may give rise to claims.

[29] The appellant responded to Antah by its letter of 18 June 1998. This letter ('the 18 June 1998 letter') turned out to have had a great bearing on the subsequent course of events.

[30] Firstly, the 18 June 1998 letter was claimed by the appellant as an application to renew the insurance policy in response to Antah's invitation in its letter of 20 May 1998.

[31] Secondly the body of the letter bore a heading 'Notice of current proceedings'. The appellant gave a chronology of events from 22 July 1997 to 18 June 1998 of the KL suit. The appellant also stated in the 18 June 1998 letter their belief that their application to set aside the judgment in default entered against TNB would be successful and that the lawyer whose unpunctuality caused the default entered against TNB had since resigned from the appellant's firm effective 1 July 1998. Since the 18 June 1998 letter is pivotal in this appeal it is appended below for its full terms and effects.

[32] The 18 June 1998 letter is as follows:

18th June, 1998.

Re: Malaysian Bar Scheme Professional Indemnity Insurance, Notice of current proceeding

In connection with our application for renewal and increase of indemnity under the above Insurance Scheme and after conducting a full and complete search, we declare that there are no outstanding claims. However, for notification purposes, we declare herewith matters for your further consideration:

(A) Our ref BP/MNA/L-196

Kuala Lumpur High Court Summons No D1–22–107–1988

Prorak Sdn Bhd and Raja Lope & Tan Co vs Tenaga Nasional Berhad (Value of suit (including interest as at June, 1998); in excess of RM9,000,000.00)

1. We act for the Defendant above.

2. Chronology of events:

22nd July, 1997	—	Our counsel in charge of this case, En Muhammad Nur Azmi bin Hashim, arrived late and the court granted judgment in default ('the judgment'). The case was recalled at 10.50 am where our counsel prayed for the Judgment to be set aside. The Plaintiffs' solicitor did not object. The judge allowed the Judgment to be set aside subject to a formal application being made. The application was file ('En 58') and the application was fixed for hearing on the 13th August, 1997.
13th August, 1997	—	Our legal assistant, En Radin Alang Iskandar, who was instructed to attend and who was to mention on behalf of the Plaintiff's solicitors arrived late and the court struck out En 58, thus reaffirming the Judgment. The counsel arrived just after the judge's decision.
16th Sept, 1997	—	An application ('En 61') to reinstate En 58 above was filed. The matter was fixed for hearing on 21st October, 1997. The Plaintiffs' solicitors objected.
21st October, 1997	—	Upon hearing counsels from both sides, the court dismissed En 61 on the grounds of procedure.
3rd March, 1998	—	Interim settlement was made between the Plaintiffs and the Defendant in the sum of RM2,195,248.00. This sum shall be refunded in the event the trial judge would to decide the suit in the Defendant's favour. On the 2nd January, 1998 and appeal was filed at the Court of Appeal.
1st June, 1998	—	As a preliminary question of law, the court ordered that written submissions be filed to determine whether the court is in fact 'Functus officio'. (See paragraph 5 below). This proceeding will continue on the 4th September 1998. At the same time, the court persuaded the Plaintiffs not to enforce the balance judgment sum pending final determination of this application. The Plaintiffs agreed.

3. Based on the facts of this case, we strongly believe that our application to set aside the Judgment will be successful. It is important here to highlight that the application and appeal which was dismissed on the 21st October, 1997 and 1st June, 1998 was never heard on its merits. Both proceedings were dismissed purely on procedural grounds.

4. We contend that the judgment must be set aside on the grounds of irregularity or nullity:

(a) the Judgment was base on the issue of liability even though there is no supporting evidence to support the Plaintiffs' claims. Further, based on the rule of balance of probabilities, the evidence adduced and presented thus far by the Plaintiffs do not support their claims and the court has failed to consider and to by the Defendant's witnesses;

(b) based on the *Rules of the High Court 1980* and Order 35 of *The Supreme Court Practice 1988*, we contend that judgment in default cannot be entered once trial has commenced. Judgment in default however, could be entered if the defendant has failed to enter a defence or notice or appearance. En 58 was a formality, which was meant to regularise the procedural defect. The Plaintiffs had no objection for reinstatement of the case;

(c) the amount of damages awarded (as per the Plaintiffs' Statement of claim) was never assessed or proved. It is settled law that the loss as claimed must be proved. The issue of one's liability is a separate question. In our present case, the court had in fact ordered that the issues in this case be limited to the issues of liability and that damages to be assessed separately in the event that the Defendant is found liable. Furthermore, the claim of the amount of loss of profit by the Plaintiffs is based on an 'estimated' amount. This was never assessed. Further, the time where the interest rate were to run in one of the Plaintiffs' claims is wrongly and excessively calculated by more than 2 years. The Plaintiffs' only witness also testified in court that they had in fact made some profit in the subject matter of this case and this must be considered in determining the Plaintiffs' true amount of loss (if any);

(d) In the Federal Court case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30, the court stated at p 36:

> It is elementary that in irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. … When it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside ex debito justitiae say, irrespective of the merits and without terms.
>
> ...

5.1 As mentioned, before this application to set aside can be heard, the court must determine whether it is in fact Functus officio. This is to say whether the court which gives the judgment is ... from determining/hearing the same matter again.

5.2 We contend that based on our present facts, Functus officio will not apply. It is settled law that judgments which are a nullity cannot be enforced and must be set aside (*Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 and *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (Federal Court). We therefore repeat paragraph 4 above.

6. Bankruptcy.

6.1 It is confirmed (as at the date of this letter) that the Plaintiffs' only witness is an undischarged bankrupt. The witness also acts as the managing director of the first plaintiff (company) and the managing partner of the second plaintiff (Partnership). This we contend has serious implications regards to the validity of the judgment:

(a) during the whole proceeding of this case, (during trial and the various affidavits submitted and affirmed by the witness) the witness clearly stated as being the managing director and the managing partner of the Plaintiffs respectively. It is clear law that an undischarged bankrupt cannot be a director of a company. Further, pursuant to section 35 of the *Partnership Act 1961*, the locus or right to bring/maintain this suit by the second plaintiff is now in issue;

(b) we contend that failure by the witness to inform the court of his true standing has seriously cast doubt on his credibility as a witness and this has never been considered by the court.

7. In regards to the application above, we have appointed En Zainur Zakaria of M/s Zainur Zakaria & Co as counsel in the above application. En Zainur Zakaria is a leading senior counsel (24 years standing) and has vast experience in such matters. He was also the former Bar Council President.

For your further information your partner, En Muhammad Nur Azmi bin Hashim has started to resign from the firm effective 1st July, 1998.

Yours faithfully,

BAKAR & PARTNERS.

[33] The appellant's case is that it was due to the alleged acts of negligence of two of its named insured that the appellant notified the respondents on 18 June 1998 of a potential claim against the appellant firm (as illustrated in the 18 June 1998 letter).

[34] Then on 30 June 1998 the first term of insurance of the appellant expired. Subsequently Antah faxed to the appellant a schedule of payment for coverage ranging between RM5m to RM7m. The appellant then paid Antah a premium for coverage of RM7m which amounted to RM11,999.45. Antah then issued Insurance Certificate No MT98/00275 to the appellant on 22 July 1998 for an indemnify of RM7m in respect of the second term of insurance.

[35] On 30 June 1999 the second term of insurance expired and it was renewed vide Insurance Certificate No MT99/00275 for indemnity of RM7m in respect of the third term of insurance.

[36] The appellant then issued two letters dated 14 October 1999 headed 'Notice of current proceedings' to Antah and Cunningham to notify them of the KL suit and that they are appealing to the Federal Court.

[37] On 22 October 1999, Rajinder Singh and Radin Alang Iskandar (partner and a legal assistant of the appellant) called at the office of the adjusters, ie Cunningham Toplis. They met one Ling Hwa Ming in the company. Ling Hwa Ming advised them to give an official notification according to the 'Claims Notification Guidelines', a copy of which was handed over to the appellant's said partner and legal assistance on the same day.

[38] Based on Ling Hwa Ming's instruction, the appellant then gave the said notice to the respondents in accordance with the 'Claims Notification Guidelines'. This was accompanied by a covering letter on 2 November 1999.

[39] The above fact assumes importance, because soon after that, on 7 January 2000, Cunningham Toplis claimed in a letter that:

(a) the appellant first became aware of the claim on 13 August 1997;

(b) the appellant notified Cunningham Toplis only on 14 October 1999;

(c) Cunningham Toplis said there was a purported breach of cll 5.2 and 5.3 of the general conditions which entitled them to deny the claim; and

(d) Cunningham Toplis asked for a written explanation for the delay occasioned purportedly under cl 7.2 of the general condition.

[40] The appellant denied Cunningham Toplis' contention above and instead contended that since no claim was reasonably expected by the appellant during the period of insurance 1 July 1997 to 30 June 1998 under Certificate No M97/02275 and T07/00275, no notification was given to Cunningham Toplis or notification of a claim for any claim or notification of a claim.

[41] In fact no notification was given to Antah of a claim reasonably expected to be made against the appellant. The simple reason was that the appellant did not expect any claim or notification of any claim against it, since the TNB's suit was still pending appeal. The appellant contended that it was only finally resolved when the Federal Court dismissed leave to appeal on 17 January 2000.

[42] In the meantime, TNB demanded from the appellant the sum of RM9,740,720.48 in a letter dated 13 June 2000, being the judgment sum to be paid to the plaintiff in the KL suit. The appellant then made a claim for the amount against the insurers.

[43] On 13 July 2000, Antah informed the appellant that the entitlement limit of their indemnity was only RM2m and not RM7m. Antah said that this was the eligible amount when the appellant first became aware of the circumstances giving rise to the claim (ie during the first period of the policy (18 June 1998)).

[44] On the question of delay, Cunningham excused the appellant for the delay in notifying them since the appellant had informed Antah when they had first become aware of TNB's claim.

[45] The appellant disputed Antah's and Cunningham's contention above. The appellant took issue and demanded an entitlement of RM7m indemnity, not RM2m. Thus in view of the dispute on the question of eligible indemnity payable, the appellant in a letter of 10 October 2000 wrote to Antah and Cunningham wherein the appellant invoked general condition 5.9 of the policy to refer the dispute to arbitration.

THE ARBITRATION

[46] In view of the next course of action taken by both the appellant and respondents in the civil court as a result of the above arbitral award, it is pertinent to now consider the approach taken by both parties and the arbitrator.

[47] Looking at the award made on 9 October 2003, the arbitrator stated that in addition to the admissions made by parties in their amended pleadings, the following facts are not in dispute as are contained in the *statement of agreed facts*. These are:

1. At all material times the Claimants (Appellants) is the insured and the Respondents severally and in varying portions of liability were their insurers under a Master Policy No DPI 43900313–04.

(a) Under the Master Policy, individual Certificates of Insurance were issued for insuring individual members of the Malaysian Bar.

(b) Insurance certificate issued by the Respondents to the Claimants (Appellants) were:

A

(i) No M97/00275 and no T97/00275 were both for the period from 1st July 1997 to 30th June 1998 (inclusive of both dates) was an indemnity for the sum of RM2 (two) million;

B

(ii) No MT98/00275 was for the period from 1st July 1998 to 30th June 1999 (both dates inclusive) was an indemnity for the sum of RM7 (seven) million; and

(iii) No MT99/00275 was for the period 1st July 1999 to 31st of December 2000 (both dates inclusive) was an indemnity for the sum of RM7 (seven) million.

C

2. Antah Sedgwick Insurance Brokers Sdn Bhd acted as brokers for the Respondents.

3. Cunningham Toplis (M) Sdn Bhd acted as the loss adjuster with respect to any claim made under the Certificates of Insurance.

D

4. The Claimants (Appellants) acted for the Defendant, the Tenaga Nasional Berhad in a High Court Civil Suit No D1–22–107–1988 wherein Prorak Sdn Bhd and Raja Lope & Tan Co were the Plaintiffs.

E

5. The Claimants (Appellants) communicated the information regarding the cause of events development of the civil suit and other matters that the Claimants were handling then to Antah Sedgwick Insurance Brokers Sdn Bhd in a letter dated the 28th June 1998.

F

6. There was no response from the Respondents, Antah Sedgwick Insurance Brokers Sdn Bhd or Cunningham Toplis (M) Sdn Bhd between the period of the 18th June 1998 up to the 14th of October, 1999.

7. A meeting took place on the 22nd October 1999 between Rajinder Singh (a partner of the Claimant (Appellant) firm) Raja Alang Iskandar (a legal assistant of the Claimant firm) and Mr Ling Hwa Ming (a senior executive officer of Cunningham Toplis (M) Sdn Bhd — the Adjuster of the Respondent company) at the office of Cunningham Toplis (M) Sdn Bhd wherein the 'Claims Notification Guidelines' issued by the Malaysian Bar was handed over to them.

G

H

8. On the 22nd October 1999 the Claimants (Appellants) gave notice according to the 'Claims Notification Guidelines' and accompanied the same with a covering letter dated the 2nd November 1999.

9. On the 7th January 2000, Cunningham Toplis (M) Sdn Bhd claimed in a letter, the following:

I

(i) The Claimants (Appellants) first became aware of the claim on 13th August 1997.

(ii) The Claimants (Appellants) only notified Cunningham Toplis on 14th October 1999.

(iii) Cunningham Toplis claimed that there was a purported breach of clauses 5.2 and 5.3 of the General Condition which entitled them to deny the claim.

(iv) Cunningham Toplis asked for a written explanation for the delay, purportedly under clause 7.2 of the General Conditions.

10. The *various certificates of insurance issued* by the Respondents to the Claimants (Appellants) as stated above in paragraph (1)(b)(i), (ii) and (iii) of these statements of agreed facts *are all 'Claims-made'* and not 'Occurrence-based' policies of insurance.

11. On the 25th of May 1998 the Claimants (Appellants) were invited by letter to renew their professional indemnity and on the 18th June 1998 the Claimants forwarded a duly executed completed proposal form to Antah Sedgwick Insurance Brokers Sdn Bhd for additional coverage.

12. Between the 2nd July 1998 and 3rd July 1998 there was *contractually* agreed between both parties and *unconditionally* accepted by Antah Sedgwick Insurance Brokers Sdn Bhd *coverage of indemnity in the sum of RM7 (seven) to be given to the Claimants (Appellants), and for which a premium of RM11,999.45 was paid as the agreed consideration for the said coverage.*

13. Full disclosure was made by the Claimants (Appellants) to Antah Sedgwick Insurance Brokers Sdn Bhd as the brokers for the Respondents at the relevant point of time by letter dated the 18th June 1998 and which disclosure did include information of the part payment of the judgment sum of RM2,195,248.00 on or around the 3rd March 1998 by the Tenaga Nasional Berhad.

14. The Claimants (Appellants) had at all material times cooperated by providing explanation to queries posed by Cunningham Toplis (M) Sdn Bhd in their letter dated 7th January 2000 and the Claimants (Appellants) also promptly furnished them with all the documents requested for by the said Adjusters.

15. After a series of letters sent by the Claimants (Appellants) to Cunningham Toplis (M) Sdn Bhd seeking for a solution to the matter, Antah Sedgwick Insurance Brokers Sdn Bhd responded on the 30th June 2000 stating that the limit of indemnity was RM2 million.

[48] These were then the parties' agreed facts. The parties posed a series of statement of agreed issues to be determined by the arbitrator. These are found in the award as follows:

Statement of Agreed Issues

1. Whether communication of information to Antah Sedgwick Insurance Brokers Sdn Bhd of material that may or may not precipitate in a claim against the Claimants (Appellants) is notification of a claim in:

(a) Law

(b) Under the terms of the Policy Insurance.

1.1 Whether such communication by the claimant (appellant) to Antah Sedgwick Insurance Brokers Sdn Bhd was actually made by Antah Sedgwick Insurance Brokers Sdn Bhd to Cunningham Toplis (M) Sdn Bhd between the period of 18.6.1998 to 14.10.1999.

2. Whether the duration of time taken by Antah Sedgwick Insurance Brokers Sdn Bhd to respond to the letters sent by the Claimants (Appellants) between 18.6.1998 to 1410.1999 was reasonable in all the circumstances.

3. What are the scope, purpose and input of the following letters taken collectively on 'Notification of Claim' namely,

(a) 14.10.1999 from the Claimants (Appellants) to Cunningham Toplis (M) Sdn Bhd.

(b) 2.11.1999 from the Claimants (Appellants) to Cunningham Toplis (M) Sdn Bhd.

(c) 7.1.2000 from Cunningham Toplis (M) Sdn Bhd to the Claimants (Appellants).

4. Was there a 'Notification of Claim' of reasonable expectations given by the Claimants (Appellants) to Cunningham Toplis (M) Sdn Bhd between 1.7.1997 to 30.6.1998.

5. Under all the circumstances when would it be considered reasonable for the Claimants (Appellants) to have expected a claim be made against them.

6. (a) Is there an obligation on the part of the Respondents to renew a policy 'unilaterally', ie in the absence of a specific application to renew.

(b) Is there an obligation and/or duty on the part of the Respondents to ensure, that every advocate and solicitor who intends to practice is covered by an Insurance Policy from the Respondents.

7. Whether the letter addressed to Antah Sedgwick Insurance Brokers Sdn Bhd dated 18.6.1998 for the purposes of renewal of a policy for an increased sum of RM7 million can be in law and/or in fact be a 'Notification of Claim' to Cunningham Toplis (M) Sdn Bhd or the Respondents.

8. It is agreed by both parties that the policies of insurance issued to the Claimants (Appellants) are *claims* made *policy*. What is the effect of the notification made on 18.6.1998 by the Claimant to Antah Sedgwick Insurance Brokers Sdn Bhd in respect of the claim for an indemnity under the policy.

9. In the event it is held that the notification made on 18.6.1998 by the Claimants (Appellants) are not a notification within the meaning of the policy in which case were the Claimants (Appellants) in breach of notification conditions contained in General Condition 5 of the Certificate of Insurance by failing to give notice of any matter, event or circumstances as soon as practicable.

[49] Upon careful perusal of the relevant documents, the arbitrator was of the view that before the requirement to notify the insurers under the policy can arise, there must be a final judgment, which in this appeal was not in existence then. The arbitrator also found that the appellant's letter of 18 June 1998 was not a notification under cl 5.1.2 but was a letter for the purpose of renewal and premium payable for an increment of indemnity. That the notification of the claim was made on 2 November 1999 and that it was a 'claims award made policy and not an occurrence-based policy'.

[50] On this finding, the respondents filed an application in the High Court to set aside the arbitrator's award, pursuant to s 24(2) of the Arbitration Act 1952, and/or inherent jurisdiction of the court.

[51] The arbitrator made the following award:

> Having regard to all the circumstances in the present dispute, it is my finding that the claimant (appellant) are entitled, on the basis of 'claims-made policy' and in the context of condition 5.1.3 of the insurance policy to an indemnity for RM7m under the third policy period, together with costs of the arbitration.

[52] Thereafter, the eight insurance companies cited in the arbitration proceeding vide Kuala Lumpur High Court OS No R2–25–216 of 2003 applied to have the arbitrator's award set aside. Meanwhile the appellant vide Kuala Lumpur High Court, OS R2–24–07 of 2004, applied to enforce the arbitrator's award against the three insurers who participated in the scheme during third period.

THE FIRST APPEAL (SETTING ASIDE THE AWARD)

[53] In the High Court, the respondents set out six grounds in its setting aside application as follows:

(a) the learned arbitrator exceeded the jurisdiction conferred on him by finding parties not party to the third term of insurance liable to pay the respondent RM7m;

(b) the learned arbitrator misconstrued/failed to appreciate material and relevant evidence; he failed to appreciate the purpose of the letter of 18 June 1998 written by the respondent when read with contemporaneous correspondence;

(c) the learned arbitrator failed to appreciate/material evidence and the law when the parties at the material time had agreed to treat the notice given by the respondent on 18 June 1998 as good notice under the policy of insurance;

(d) the learned arbitrator misconstrued the terms of the policy and the relevant/material evidence when he held notice would only be valid if issued to the loss adjusters;

(e) the learned arbitrator placed too much reliance on the label of the policy of insurance namely that the policy was a 'claim-made' policy. In so doing, the learned arbitrator placed too little or, in effect, no importance on the express terms and conditions of the policy of insurance; and

(f) the learned arbitrator failed to appreciate that if the letter of 18 June 1998 was not a notification then the respondent would have been in material breach of the policy of insurance in failing to notify the insurers within a timely and reasonably practicable manner. This breach would have been material and would have entitled the insurers to refuse cover to the respondent completely under the terms of the insurance policy.

[54] At the hearing of the motion, the appellant raised a preliminary objection in connection with the respondents' grounds above. The appellant contended that the grounds pleaded in the notice of motion are more general in nature as compared to the above (six grounds) and that it would be unfair to the appellant to answer a relatively unpleaded case. The appellant further contended that the application must be limited to the grounds pleaded in the notice of motion. This brings this appeal to the pith of the appellant's assertion on this point, ie that compliance with O 69 r 4 of the Rules of the High Court 1980 is mandatory.

[55] It would be relevant at this stage to briefly look at the findings made by the learned High Court judge on this point.

[56] Based on the submissions made by parties in the setting aside application, the learned High Court judge found that even if the grounds set out in the respondents' submissions are wider and broader in the notice of motion, it is observed that 'O 69 r 4 of the Rules of the High Court does not state that grounds must be stated in full', and even if 'it did, it would cause injustice to throw out the matter based on non-compliance with the rules'. On that finding, the learned judge indicated that she referred to O 1 and O 2 r 3 of the Rules of the High Court 1980.

[57] Secondly on the issue of whether the 18 June 1998 letter was a notice within the ambit of cl 5.1.2 of the insurance certificate, the learned trial judge set out to interpret the legal effect and consequence of the said letter.

[58] Contrary to the arbitrator's award on the construction of the said letter, the learned judge found that the said letter was indeed a notice within the purview of cl 5.1.2, since it 'clearly contained circumstances which may reasonably be expected to give rise to a claim'. A

[59] Thirdly the learned High Court judge found that the arbitrator erred in finding that parties could not by consent, regard an irregular notification as good notice since the notice was a contractual provision which parties could waive its compliance if they so consent. B

[60] The learned High Court judge found that in this regard the arbitrator had fallen into error. Based on the findings and construction applied by the arbitrator, the High Court found that there was an error of law on the face of the record. The learned judge set aside the award with costs. Hence these appeals. C D

[61] Before us, both parties submitted at length over the various issues raised, which were in themselves highly contentious and technical.

[62] Central to this first appeal is whether the learned High Court judge had correctly decided to set aside the award of the arbitrator on the grounds that there is an error of law on the face of the award. E

[63] In setting aside the award on the above ground, the learned High Court judge exercised her power under s 24(2) of the Arbitration Act 1952 ('the Act'). F

[64] Section 24(2) of the Act reads:

> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside. G

[65] Thus what the respondents has to show is that the alleged *error of law on the face of the award amounts to misconduct* within the meaning of s 24(2) of the Act. 'Misconduct' in this technical sense means an irregularity and not moral turpitude. H

[66] What then is 'error of law on the face of the award'? I

[67] This is best answered by the judicial pronouncement of Lord Dunedin sitting in the Privy Council in *Champsey Bhara Co v Jivraj Balloo Spinning & Weaving Co Ltd* [1923] AC 480; AIR 1923 PC 66 (and quoted with approval

in *Hartela Contractors Ltd v Harteco JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788) where His Lordship said:

> … An error in law on the face of the award means, in Their Lordship's view, that you can find in the award or a document actually incorporated thereto a note appended by the arbitrator, stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous.

[68] The above proposition of law was approved in the Federal Court case of *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743.

[69] Thus, having regard to the applicable law, the question is whether there was error on the face of the award amounting to misconduct on the part of the arbitrator justifying the court in setting aside its award.

[70] The respondents' six grounds of appeal alluded to earlier represented the errors of law on the face of the award held against the arbitrator.

[71] If those six grounds could be summarised, they are these:

(a) That the arbitrator failed to appreciate the actual terms of the policy he was called upon to construe, particularly cll 5.1.1, 5.1.2 and 7.1.3.

(b) That the arbitrator had in effect disregarded and had insufficient regard to the contemporaneous correspondences between the parties in the matter.

(c) That the arbitrator had particularly failed to appreciate the terms of the policy by including a party not insured for the second and third terms of insurance and conversely, not naming a party so covered, as a party to the suit. And to top it, held all eight appellants liable for a sum of RM7m for the third term of insurance when they were not the insurers for the third term of insurance. There is a misconstruction of the clauses of the master policy.

(d) That the arbitrator had misconstrued the effect by the 18 June 1998 letter and had agreed with the appellant that it was not intended to constitute notice pursuant to general condition 5.2, contrary to the correct interpretation based on contemporaneous evidence.

(e) That the arbitrator in considering that the policy of insurance is a 'claims-made' policy has committed an error since in reference to cl 7.1.3 in so labeling the policy as such, determined that the respondent are liable to indemnify the insured for claims made during

the currency of the policy regardless of when the negligence giving rise to those claims may have occurred.

[72] The respondents cited other instances of the same nature, said to have been committed by the arbitrator. According to the respondents the sum total of all these acts of the arbitrator in essence meant that the arbitrator had for the main part, completely misconstrued the policy of insurance.

[73] In the light of the above, would these acts of the arbitrator indicate error of law on the face of the record amounting to misconduct on his part?

[74] However before that question can be answered, authorities such as *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 and *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428; [1987] CLJ Rep 95, have held that one has to distinguish between a case where a dispute is referred to an arbitrator in a decision in which a question of law becomes material, from the case in which a *specific question of law was referred to him*.

[75] In the former case, 'the court can interfere only if and when any error appears on the face of the award. However in the latter case, interference is possible on the ground that the decision upon the question of law is an erroneous one' (per HRH Azlan Shah J as His Highness then was).

[76] In this appeal we have had regard to the pleadings where it is apparent that the award relates to specific issues which the arbitrator was requested to decide upon, and which were condensed as 'statement of agreed issues to be determined by the arbitrator'.

[77] Having regard to the above, it is our view that in this appeal, the specific issues formulated in specific questions were submitted to the arbitrator for his decision. These questions are in the main, questions of construction, which are questions of law.

[78] Given the six grounds put up by the respondents in their application to set aside the award, our view is that, even if the arbitrator had misconstrued the 18 June 1998 letter, or that he had drawn wrong inferences of fact from the evidence, or that he had failed to appraise the evidence, or that the respondents would have given a different conclusion to the issues which were before the arbitrator were they to decide, it does not warrant an interference by the court on two grounds:

(a) that these were specific issues referred to him (see *Ganda Edible Oils*); and

(b) the said award failed to show any error of law on the face of it.

[79] It must also not be lost sight of that all the facts as are impugned by the respondents in the award are agreed facts. It is certainly not open now to the respondents to renege on them.

[80] The other point raised by the appellant in this appeal relates to the issue of the nebulous state of the respondents' grounds in its notice of motion.

[81] It is our view that the grounds as were couched in the notice of motion appear unspecific as to the class of 'error' the arbitrator was said to have committed.

[82] Thus we agree with the appellant that the respondents should be confined to matters pleaded in the said notice of motion. Issues which are not pleaded should not be raised.

[83] The appellant attempted to meet each and every ground put up by the respondents. Essentially they can be summarised thus:

(a) With regard to ground (a) that the arbitrator had found all the respondents liable, the appellant's answer was that as parties to the arbitration all the respondents accepted that they were the insurers under the master policy and accepted responsibility as such, as clearly stated in the statement of agreed facts.

(b) The arbitrator in interpreting the 18 June 1998 letter had regard not only to its substance but also to the true intent and purpose of the entire circumstances in which the letter was written. The arbitrator had before him the letters of 20 May 1998 inviting the appellant to renew the policy, the respondents' response in its letter of 2 July 1998 and most importantly the respondents' letters of 4 January 2000 and 7 January 2000 where the respondents claimed that they had only been notified of the matter in October 1999. This answers grounds (b), (c) and (d) above (the respondents' six grounds to set aside at p 22).

(c) As regards ground (e), the arbitrator had carefully deliberated the authority of *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co* (1993) 99 DLR (4d) 741 (Supreme Court of Canada) and after having regard to the terms of the policy, decided that it was a 'claims-made policy' (see cl 7.1 of the policy; it envisages a situation where disclosure will not affect limit of coverage, in that once risks are disclosed to the insurer, he may quote new rates for coverage to take into account the increased risk).

[84] In any event, whether it is 'claims-made' or 'occurrence-based' policy, what is important are the facts of the case. Not to the label attached to it. In any case both parties as manifested in the statement of agreed facts, had agreed that they were to be regarded as 'claims-made' policy.

[85] Ground (f) have been answered earlier. Since it is an agreed fact that notification was made in accordance with the terms of the policy on 22 October 1999, we agree with the appellant's submission that the respondents had waived the issue of notification. The issue here if any, is really one of quantum only.

[86] The respondents alleged that the arbitrator had failed to give effect to the terms of the insurance policy especially with regard to general condition 5.1.3. However it must not be lost sight of that the arbitrator was required to interpret the terms of the policy which includes cl 5. Thus as a matter of law, the parties are bound by the arbitrator's interpretation.

[87] The appellant had contended that because the arbitrator was appointed and requested to hear and decide specific issues reduced in a statement of agreed issues, it does not make the award bad, even if the decision is erroneous (which the appellant denied).

[88] We agree with the authorities cited by the appellant such as *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428; [1987] CLJ Rep 95, *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, in which a distinction should be drawn between two different situations involving disputes referred to an arbitrator.

[89] Authorities such as *Newton v Bicknell and Bicknell Associates (a firm)* [1988] (Transcript Association) 27 September 1988, *How Engineering Services Ltd v Lindner Ceilings Floors Partitions plc* (1999) 64 Con LR 67 and *Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd's Rep 187 for instance, had decided that an arbitrator does not commit misconduct just because he makes an error of fact or law.

[90] Following that, it is only when 'misconduct' is shown to have been committed by an arbitrator that the court is empowered to set aside its award. In this appeal we find no misconduct had taken place in the arbitrator's award.

[91] For completeness, the full text of the meaning of the word is illustrated below.

[92] 'Misconduct' is defined most succinctly in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, where it was stated that:

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance failure to observe the rules of natured justice, appearance of bias or partiality. It also includes irregularity of action which is not consonant with the general principles of equity and good conscience. These illustration are not meant to be illustrative. But failure to analyse and appraise evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material relevant and had gone to affect the award that the award will be vitiated.

[93] It is of course trite that at common law an award of the arbitrator is final, binding and conclusive unless a contrary intention is disclosed in the agreement. It may not be challenged merely on the ground that it is erroneous (*Hartela Contractors Ltd v Harteco JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788).

[94] Though there were judicial differences as to whether courts have inherent jurisdiction to intervene in an arbitration, the current position seems to be settled in the Court of Appeal decision in *Dato' Samsudin Abu Hassan v Robert Kokshoorn* [2003] 3 MLJ 331; [2003] 3 CLJ 1 which determined that the power of the court to intervene in arbitration is not inherent. The power to do so is reposed in s 24(2) of the Arbitration Act 1952 conferring jurisdiction to set aside an award on account of misconduct by an arbitrator, or that the award had been improperly procured.

[95] As grudging and slow as courts had been in intervening and setting aside awards of arbitrators, courts would act accordingly if there are errors of law found in the face of the award.

[96] The respondents' contention (as evident in its application to set aside the award) was that the arbitrator had misconducted the proceedings within the meaning of s 24(2) of the Arbitration Act 1952 and in particular, had committed several serious errors of law on the face of the record in failing to analyse and appraise evidence which is material and relevant.

[97] In that context, the respondents contended that the award is irrational and unreasonable since the arbitrator took into account irrelevant matters and failed to take into account relevant matters.

[98] The respondents further contended that the arbitrator had misconstrued the provisions of the certificate of insurance issued under the master policy scheme for the Malaysian Bar Professional Indemnity Insurance which bound the appellant and the respondents.

[99] The arbitrator was also said by the respondents to have caused irregularity since he failed to deliver an award which was in accordance with the provisions of the contract of insurance and the law.

[100] It is also the respondents' case that in interpreting the insurance policy, the arbitrator had focused heavily on the label of the policy of insurance company namely, that it was a 'claims-made' policy and that the arbitrator paid scant regard to the date when the negligent act or omission occurred.

[101] In short, the respondents contended that the arbitrator had entirely misinterpreted the notice requirements and notice obligations under cl 5 of the policy of indemnity, that the arbitrator had failed to appreciate or properly appreciate the evidence before him, that the arbitrator failed to appreciate the legal and factual matters before him and thus had wrongly decided on the legal questions which were referred to him for decision.

[102] It must be reiterated that we agree with the appellant's contention that since no claim was reasonably expected by the appellant during the period of insurance ie from 1 July 1997 to 30 June 1998 under Certificate No M97/02275 and T97/00275, no notification was given to Cunningham Toplis or notification of a claim for any claim or notification of a claim.

[103] A perusal of both general conditions 5.1 and 5.1.2 of the policy of indemnity is now pertinent. The result is this — that the question arising from this is at which point in time should notice be given to the insurers of a 'matter, event or circumstance … which any reasonably be expected to give rise to a claim against the insured?'

[104] Various time frames were postulated as to which date constitutes the 'matter, event or circumstances' which may give rise to a claim against the insurers by the appellant.

[105] The appellant contended that its letter (the 18 June 1998 letter) to Antah Sedgwick Insurance Brokers Sdn Bhd was only to send notification of the potential claim.

[106] And that no notification had been given to the appointed loss adjusters (Cunningham Toplis (M) Sdn Bhd).

[107] Curiously enough the appellant requested that the 18 June 1998 letter be deemed sufficient/proper notice to satisfy general condition 5.1.2 of policy of indemnity.

[108] The respondent agreed to accept the appellant's notification on 18 June 1998 as proper notification. However the appellant now made an about turn. It resiles from its earlier stance and said that the 19 June 1998 letter was only a request for renewal of firm's insurance coverage pursuant to general condition 5.3 of policy of indemnity.

[109] The appellant said that the 18 June 1998 letter does not relate to notification under general condition 5.2.1 of the policy of indemnity and relates only to general condition 5.3.

[110] The respondents said that sufficient notification of claim by TNB was made to the brokers ie Antah Sedgwick for the purpose of renewal of coverage and in that, the appellant had given notice of potential claim on 18 June 1998.

[111] By the respondents renewing the said policy, the appellant contended that the respondents had *accepted* liability to pay RM7m under the third policy of insurance for the claim.

[112] The sum of it is that, the arbitrator had given his interpretation of general conditions 5.1.1 and 5.2.1. The arbitrator's view is that notice under condition 5.1.2 is for potential claim, whereas condition 5.1.1 relates to actual claim. As for condition 5.1.3 the arbitrator construed it to be for a situation where only one notice has been given, but that it is silent in a situation where both notices are given for the purpose of determining under which policy the indemnity is payable.

[113] The arbitrator construed condition 5.1.3 as a deeming provision, which provides an alternative where a notice has been given in accordance with either 5.1.1 or 5.1.2 falling under the period of insurance of which such notice was given.

[114] Thus we see no 'misconduct' on the part of the arbitrator in the light of what followed next in his construction of the said general condition. The arbitrator stated that in view of the alternative given, and where the insured

had given both notices, indemnity should be payable under the second notice under condition 5.1.1 when the potential claim under condition 5.1.2 has crystallised into an actual claim.

[115] Thus in a situation where the claimants have given one or both notifications, the importance of determining under which of the three policies to indemnity is payable cannot be understated.

[116] The arbitrator viewed condition 5 in its entirety and decided that 5.1.3 inclined heavily towards the conclusion that the policies on this appeal are 'claims-made' rather the 'occurrence-based'. We agree with the arbitrator.

[117] In any event, what has to be in the forefront of our minds is that though the lawyer in the appellant's firm had committed two acts of professional negligence during the currency of the first policy, the legal process in court remain unabated until the Federal Court finally put the matter to rest TNB's various attempts to set aside the default judgment during the currency of the third policy.

[118] Our attention was drawn to cl 4.4 of the insurance policies (in all three) which provided that:

> … all claims first made or deemed to have been first made against all or any of the insured in or made Period of Insurance arising from one act or omission or series of acts or omissions attributable to the same underlying cause or event shall be regarded as 'one claim'.

[119] We agree with the arbitrator that all claims arising out of the misconduct of one person acting alone or in collusion with others is to be regarded as attributable to one underlying cause and is deemed to constitute 'one claim'.

[120] The arbitrator went on to state that though the current lawyer (from the appellant's legal firm) was one of the named insured under the first policy, it is only logical that his name would not be in the second and third policies when the same were renewed, since the lawyer had long since left the appellant's firm.

[121] So even if the lawyer had misconducted himself during the currency of the first policy, the claim which arose therefore could not be determined with certainty until the third policy came about.

A **[122]** In that sense, cl 4.4 of the policy as elaborated above further strengthened the position that the parties had entered into a 'claims-made' and not 'occurrence-based' insured policy.

B **[123]** In the circumstance too, we find it incomprehensible for the insurer and for that matter, even for the insured, to be allowed to change the goal post (the date of a notice under condition 5 to and fro) as and when it suits them.

C **[124]** In view of the facts and construction of cl 5 in its entirety, the notice is that dated 22 October 1999 vide covering letter dated 2 November 1999 during the currency of the third policy.

D **[125]** We agree with the arbitrator on the position taken and the view that notwithstanding the waiver by the respondents of their right under condition 5.1.2 (to be properly served) the appellant's letter of 18 June 1998 addressed to the insurance brokers is irrelevant for the purpose of condition 5.1.3.

E **[126]** We give emphasis as did the arbitrator that the 18 June 1998 letter was an application to the respondent to renew the first policy with increase in the indemnity from RM2m to RM7m, thus the disclosure made as regards the court proceedings, so that a proper assessment whether to increase the premium or otherwise could properly be made by the respondents.

F **[127]** How such disclosure (of the court case) could be construed to change the nature and object of the 18 June 1998 lettter is indeed baffling.

G **[128]** Surely it is known that the full disclosure of the pending court case is to allow the insurer to gauge the risk involved should it accept a bigger risk in the second and subsequent policies should the outcome be unfavourable.

H **[129]** Yet the question is whether the arbitrator had committed error on the fact of the record in so construing that the appellant's letter of 22 October 1999 effectively constitutes the necessary notification of claim to the loss adjusters as required by general condition 5.1.1 read with condition 5.2 of the policy.

I **[130]** Insofar as the arbitrator was concerned, even though the acts of professional negligence committed by the lawyer in the TNB case were committed during the currency of the first policy, this gave rise to a potential claim under condition 5.1.2 and subsequently a claim for indemnity was notified under the third policy under condition 5.1.1 and thus the appellant should be indemnified under the third policy.

[131] Insofar as we are aware, the interpretation and construction given by the arbitrator was well within his term of reference as arbitrator; albeit when the question were specific questions of law, and reading these with conditions 4.4 and 5.1.3 of the policy, his interpretation of it being a 'claims-made' as opposed to it being an 'occurrence-based' policy was in order.

[132] Thus if it is in order, correct and proper, it should attract a minimum level of judicial interference. As decided by the court in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788:

> The general rule at common law is that … That award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous (per Shah J in *Union of India v Rallia Ram* AIR 1963 SC 1685).

[133] The court in *Hartela* went on to state that:

> The award or arbitration is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribune chosen by the parties and the civil courts which we entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement.

[134] It is important to note this that our Arbitration Act 1952 (on relevance Act at the relevant period, not the new Arbitration Act 2005) is in pari materia with the English Arbitration Act 1950.

[135] Thus the case of *Exormisis Shipping SA v Oonsoo, the Democratic Peoples Republic of Korea and the Korean Foreign Transportation Corporation* [1975] 1 Lloyd's Rep 432 (at item RBA) would be persuasive. In that case, the High Court held that the only power of the court to intervene in arbitration was the statutory power contained in the Arbitration Act 1950 and that there was no inherent power to supervise arbitrators.

[136] In fact this position was adopted by the Court of Appeal in *Dato' Samsudin Abu Hassan v Robert Kokshoorn* [2003] 3 MLJ 331; [2003] 3 CLJ 1.

MISCONDUCT UNDER S 24(2) OF THE ACT

[137] Since it is the High Court judge's ruling that the arbitrator had committed misconduct in the proceedings by committing several serious errors of law on the face of the record in failing to analyse and appraise

A evidence which is material and relevant and so affecting the award, it is critical to see what is the scope of misconduct in this context.

[138] The Federal Court decision of *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743 which approved the ruling in *Sharikat Pemborong*'s case, inter alia, stated that:

B

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity … It includes failure to perform the essential duties which are cast on an arbitration as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonants with the general principles of equity and good conscience …

C

[139] The critical part of the Federal Court's ratio is this:

D

> ... However, failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated.

E **[140]** Our view that the arbitrator cannot be faulted with misconduct is strengthened by the observation of Gopal Sri Ram JCA in *Hartela*'s case where His Lordship said:

> ... I have searched in vain for a better description of what Parliament meant by the use of the expression 'misconduct' in the Act of 1952.

F

> In my judgment the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great case and with a proper sense of responsibility. One may do well to keep in mind the words of Sharman J in *Puri Construction Pvt Ltd v Union of India* AIR [1989] SC 777 at p 780:

G

> When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.

H

[141] We are of the view that the above prohibition was precisely what the learned High Court judge did in the instant appeal.

I

[142] We are further fortified in our view with the ruling made by Augustine Paul J as His Lordship then was in *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545 (at item 11 of the RBA) at p 552, where he, inter alia, said:

... The Act (Evidence Act 1950) shall apply to all judicial proceeding in or before any court, but *not* to affidavits presented to any court or officer *nor to proceedings before an arbitrator*. (Emphasis added.)

[143] The learned judge went on to say that:

… Thus an arbitrator is not bound by the strict rules of evidence, and it is not a valid objection to the proceedings if he has departed from some technical rule of the Evidence Act (see *Suppu v Govindacharyar* [1887] 11 Mad 85).

A departure from the rules of the Evidence Act 1950 does not per se amount to misconduct unless the rule of evidence violated is one which is based on natural justice and an infringement of it is therefore repugnant to one's sense of justice and fairness.

[144] The above observation by Augustine Paul J was quoted with approval by Gopal Sri Ram JCA (as he then was) in *Hartela*.

[145] Authorities such as *Newton v Bicknell and Bicknell Associates* [1998] (Transcript Association) 27 September 1988 and *Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd's Rep 187 (at item 12 of the RBA) had ruled that an arbitrator does not commit misconduct because he makes an error of fact or law.

[146] In fact in advanced arbitration systems, a judicial power to correct during the course of the reference, procedural rulings of an arbitration which are with his jurisdiction is unheard of.

[147] As the courts in *Bill Biakh v Hyundai Corporation* observed, it was unsustainable for one of the parties to simply say that the arbitrators committed misconduct because they came to the wrong conclusion.

[148] The court in *Bill Biakh v Hyundai Corporation* observed that in connection with post award remedies, the decision of the Court of Appeal in *Moran v Lloyd's (A Statutory Body)* [1983] QB 542 is a clear authority for the proposition that an error of law or fact cannot by itself amount to misconduct.

... That does not of course mean that the admission of for example, utterly irrelevant evidence and reliance on it in the reasons for the award might not afford evidential material for a broker attack on the award itself alleging misconduct on the part of a arbitrator, but a mere error in relation to the admissibility of evidence does not by itself amount to misconduct …

[149] It follows therefore that the respondents' claim that the learned arbitrator's alleged non-appreciation of the evidence is baseless.

[150] In fact there is nothing in the respondents' case which suggested that the learned arbitrator had committed any impropriety or wrongdoing. In fact the allegation of misconduct by the learned arbitrator is a grave issue and would be sustained only in very narrow and drastic circumstances in the form of corruption, bias or other forms of conduct pointing to no less than an unequivocal moral turpitude.

[151] In view of the above and in a like situation, the approach of the court is to be one of circumspection. Theirs is not to replace the arbitrator as the arbiter of law, evidence and facts.

[152] *Hartela* and *Jeuro* had clearly indicated that one must satisfy that for misconduct to exist the violation of rule of evidence must be one based on natural justice. Secondly, it must be shown that the infringement of rule must be repugnant to one's sense of justice and fairness.

[153] In our view the grounds pleaded by the respondents in the notice of appeal do not constitute misconduct as provided for under s 24(2) of the Act.

[154] The short answers to all of the respondents' allegation can be summarised thus:

(a) Arbitration is an alternative dispute resolution mechanism existing outside of the judicial system. Thus intervention in the arbitral process should be limited to instances provided by law.

(b) The court has no inherent jurisdiction to set aside an award made by an Arbitrator (see *Dato' Samsudin Abu Hassan v Robert Kokshoorn*) is on the basis of an error of law on the face of award.

[155] In fact if we were to revisit the matters alleged by the respondents to be errors of law on the face of the award it could be seen that:

(a) The alleged errors of law were on issues which the arbitrator was required to decide on as *a matter of law*. (Emphasis added.)

(b) The alleged errors were on issues in which the arbitrator was to decide on as *a matter of fact*. (Emphasis added.)

[156] In view of the array of authorities in support of defences against these contentions, particularly that of *Ganda Edible Oils* it is clear that parties are bound by the construction of the policy and the interpretation of law made

by the arbitrator for the simple reason that he was required by the parties to specifically answer the legal questions which are addressed in the award.

[157] By taking this matter up before to the High Court, the respondents were in actual fact seeking to reargue and reopen the entire arbitration before the court. The case of *Sharikat Pemborong* was clear in its ruling that the courts are not there to rehear the matter in its entirety.

[158] In our view therefore, it is clear that none of the contentions or allegations made against the arbitrator amounted to a violation of there being an error on the face of record amounting to misconduct.

[159] The respondents had therefore failed the required test.

[160] Thus after hearing both appeals together and having scrutinised the copious pleading and documents submissions and authorities filed and cited by parties, it is by majority decided that this appeal (W-04–289 of 2006) is allowed.

[161] The order of High Court is set aside. As regards the second appeal W-04–1177 of 2006, we allow order in terms. Costs in both appeals to the appellant here and below and the deposit to be refunded to the appellant.

[162] Our learned sister Zaleha Zahari JCA is dissenting on both appeals.

Zaleha Zahari JCA:

[163] Appeal No W-04–289 of 2006 ('the first appeal') is directed against the decision of the Kuala Lumpur High Court judge dated 17 October 2006 in setting aside an arbitrator's award dated 9 October 2003, and in varying it, whist Appeal No 02–1177 of 2000 ('the second appeal') is directed against the dismissal to enforce the same, which was consequential upon the decision to set aside and varying the same.

[164] This is a minority decision. I am of the view the High Court judge was right in arriving at the findings and conclusions which she did. On my part, I dismissed both appeals with costs. My reasons are as follows.

BACKGROUND

[165] The background facts are these. The respondents in these appeals are insurance companies ('the insurers') who participated in the Malaysian Bar Professional Indemnity Insurance Scheme ('the scheme') as required under

the Legal Profession Act 1976. The master policy for the period 1 July 1997 to 30 June 1998 ('the first period') was No DPI 43900246–04, for the period 1 July 1998 to 30 June 1999 ('the second period') was No DPI 43900313–04, whilst for the period 1 July 1999 to 31 December 2000 ('the third period'), the policy was No DPI 43900362–01.

[166] Different companies participated during these three periods in varying proportions. For the first period, ten insurance companies participated in the scheme in the following proportions:

Insurance Company	Proportion
(i) Malaysia National Insurance Sdn Bhd	48.5%
(ii) Sun Alliance Insurance (M) Sdn Bhd	25%
(iii) American Home Assurance Co Ltd	12%
(iv) Hong Leong Assurance Berhad	2%
(v) Nusantara Worldwide Insurance (M) Sdn Bhd	1%
(vi) Aetna Universal Insurance Sdn Bhd	2.5%
(vii) The Malaysian Co-Operative Insurance Society Ltd	2%
(viii) Talasco Insurance Sdn Bhd	1%
(ix) The People's Insurance (M) Sdn Bhd	5%
(x) Royal Insurance (M) Sdn Bhd	1%

[167] The number reduced to eight for the second period in the following proportions:

Insurance Company	Proportion
(i) Malaysia National Insurance Sdn Bhd	48.5%
(ii) Sun Alliance Insurance (M) Sdn Bhd	25%
(iii) American Home Assurance Co Ltd	12%
(iv) Zurich Insurance (M) Berhad	10%
(v) Nusantara Worldwide Insurance (M) Sdn Bhd	1%
(vi) The Malaysian Co-Operative Insurance Society Ltd	1.5%
(vii) Talasco Insurance Sdn Bhd	1%
(viii) Royal Insurance (M) Sdn Bhd	1%

[168] It was further reduced to three for the third period in the following proportions:

(a) Malaysia National Insurance Sdn Bhd 97.5%

(b) MCIS Insurance Bhd 1.5%

(c) Talasco Insurance Sdn Bhd 1%

[169] From the above it is clear that the liability of the participating insurance companies varied from one period to another, eg Malaysia National Insurance Sdn Bhd's liability was 48.5% in the first and second period, whilst in the third period, their liability had substantially increased to 97.5%.

[170] Antah Sedgwick Insurance Brokers Sdn Bhd ('Antah') were appointed to act as brokers in respect of certification of the insurance, whilst Cunningham Toplis (M) Sdn Bhd ('Cunningham') was appointed as loss adjusters with respect to any claim made under a certificates of insurance.

[171] Individual certificates of insurance were issued for insuring individual members of the Malaysian Bar. Under Certificates No M97/00275 and T97/00275, the firm, Bakar & Partners (the appellant in both appeals, subsequently referred as 'the claimant'), were insured for an indemnity limit of RM2m for the first term of insurance. For the second and third term of insurance, under Certificate No MT98/00275 and Certificate No MT/99/00275 respectively, the amount for which the claimant was insured was for an indemnity limit of RM7m.

[172] The terms of contract of insurance of the claimant for the three terms were the same. The clauses referred to in argument in these appeals are as follows:

> 4. Insuring Clauses
>
> 4.1 On the terms and conditions herein contained and in consideration of the Premium the Insurers shall indemnify the Insured against any claim first made against any or all of them during the Period of Insurance in respect of any civil liability occurred in the course of conduct of the Profession by the Practice.
>
> 4.4 All claims first made or deemed to have been first made against all or any of the Insured in one or more periods of Insurance arising from one act or omission or series of acts or omissions attributable to the same underlying cause or event shall be regarded as 'One Claim'. All claims arising out of Misconduct of one person acting alone or in collusion with others shall be regarded as attributable to one underlying cause and accordingly deemed to constitute 'One Claim'.
>
> 5. General Conditions
>
> 5.1
>
> 1. The practice shall ensure that Notice is given as soon as practicable of any claim made against the Insured during the Period of Insurance which may form the subject of indemnity under this Insurance or of the receipt of any intimation of an intimation to make a claim against the Insured.

2. Notice shall also be given of any matter event or circumstance of which the Insured shall become aware during the Period of Insurance and which may be reasonably expected to give rise to a claim against the Insured.

3. Any claim arising from any matter, event or circumstance of which Notice has been given in accordance with 5.1 or 5.1.2 shall be regarded as a claim first made during the Period of Insurance in which such Notice was given.

5.2 Notice in terms of General Conditions 5.1 shall be given in writing or by Tested Telex or Tested Facsimile to:

Cunningham Toplis (Malaysian) Sdn Bhd
Box 35, 10th Floor
Menara TR
161B Jalan Ampang
50450 Kuala Lumpur
Telephone No 03-261 7188
Facsimile 03-261 8012

SPECIAL PROVISIONS

7.1 Innocent Non-Disclosure

The Insurers shall not exercise their right to avoid this insurance on the grounds of a failure on the part of the Named Insured at inception or at any renewal thereof to disclose facts material to the assessment of risk or on the grounds of an incorrect representation of a kind likely to have materially affected the assessment of risk hereunder.

7.2 Save in the case of non-payment of the Premium but subject to General Conditions 5.3 and 5.10 the Insurers will not seek to resile from this contract or to avoid any claim on the grounds of breach of or non-compliance with the terms.

PROVIDED That

1. the Named Insured shall establish on a reasonable balance of probability that the alleged non-disclosure or misrepresentation was innocent and free from fraudulent conduct on their part.

2. the Insurers may at their discretion adjust the Premium and other terms of this insurance or those which would have applied had such fact or circumstance been disclosed.

3. where the Insurers should have been notified during a preceding Period of Insurance of a claim made against the Insured or of an event or circumstance which could have been reasonably expected to give rise to such a claim and the indemnity to which the Insured would have been entitled was in any way more restricted than that obtaining at the date of notification the Insurers shall be liable only to the extent applicable during such preceding period of Insurance.

[173] The circumstances which led to the claimant making a claim on the insurers which proceeded to arbitration, then, upon an award being made in favour of the claimant, the subject matter of an application to set aside, and an application to enforce the same, and thereafter, the subject matter of these appeals are these.

[174] During the currency of the first term of the policy, in respect of Kuala Lumpur High Court Summons No D1–22–107 of 1988 between *Prorak Sdn Bhd and Raja Lope & Tan Co v Tenaga Nasional Berhad* ('the KL suit'), the claimant was retained to appear for the defendant ('TNB'). By reason of the failure of the claimant's lawyer to be punctual in the court, judgment in default was entered against TNB on 22 July 1997. An application to set aside the default judgment against TNB was then filed. The claimant's lawyer again failed to be punctual at the hearing of the application to set aside the default judgment on 13 July 1997. This resulted in the application to set aside the default judgment against TNB being struck out. An application to reinstate the application to set aside the default judgment against TNB was then filed on 16 September 1997 which application was dismissed by the High Court with costs on 21 October 1997. On 18 November 1997 the claimant lodged an appeal to the Court of Appeal against the decision of the High Court refusing the application to reinstate the application to set aside the default judgment.

[175] An interim payment of RM2,195,248 was made by TNB on 3 March 1998 to the plaintiff in the KL suit pursuant to the default judgment entered against TNB. TNB then issued a letter to the claimant dated 20 March 1998 alleging negligence against the claimant and that TNB will hold the claimant liable for any payment and damages which TNB is made to pay to the plaintiff in the KL suit due to the execution of the default judgment against them.

[176] The claimant's policy for the first term of insurance was scheduled to expire on 30 June 1998. The record shows, vide letter dated 20 May 1998 from Antah to the claimant, the claimant was invited to renew their policy for another period of 18 months commencing 1 July 1998 and expiring 31 December 1999. This letter required the claimant to report all claims they were aware of or ought to be aware of within the current insurance, ie before 30 June 1998. The claimant was also required to report all circumstances, within the current year of insurance, they were aware of or ought to be aware of, which may give rise to claims and to advise Antah of any change in the number of lawyers engaged in the claimant's firm as at 1 July 1998, if different from the names declared in the proposal form as the mandatory (compulsory) limit of indemnity was dependant upon the actual number of lawyers engaged in the claimant's firm on the said date.

A **[177]** On 1 June 1998 the Court of Appeal dismissed TNB's appeal against the decision of the High Court refusing reinstatement of the application to set aside the default judgment against TNB. To this development the claimant filed another application in the High Court to set aside the default judgment.

B

[178] The claimant then vide letter dated 18 June 1998 responded to Antah's letter dated 20 May 1993 (the invitation to renew the insurance policy). The claimant's letter bearing the heading 'Notice of current proceedings' gave a chronology of events for the period 22 July 1997 to 18 C June 1998 of the KL suit and their believe that their application to set aside the judgment in default entered against TNB would be successful. En Muhammad Nur Azmi bin Hashim (the lawyer concerned whose unpunctuality led to the default entered against TNB) has resigned from the claimant firm effective 1 July 1998.

D

[179] On 30 June 1998 the first term of insurance of the claimant expired.

[180] On 2 July 1998 Antah faxed to the claimant a schedule of payments for coverage ranging between RM5m to RM7m. The claimant then paid a E sum of RM11,999.45 as premium for coverage of RM7m to Antah who subsequently issued Insurance Certificate No MT98/00275 to the claimant on 22 July 1998 for an indemnity of RM7m in respect of the second term of insurance.

F

[181] On 4 September 1998 the High Court dismissed the second application filed by the claimant to set aside the judgment in default against TNB. The claimant filed an appeal against this decision of High Court dated 4 September 1998.

G

[182] On 30 June 1999 the second term of insurance of the claimant expired. It was renewed vide Insurance Certificate No MT99/00275 for an indemnity of RM7m in respect of the third term of insurance.

H **[183]** On 11 October 1999 the Court of Appeal dismissed the appeal lodged against the second application to set aside the judgment in default against TNB. The claimant then filed an application for leave to appeal to the Federal Court against the Court of Appeal decision dated 11 October 1999.

I **[184]** The claimant then issued two letters on 14 October 1999, bearing the heading 'Notice of Current Proceedings' one to Antah, and the other, to Cunningham, for notification purposes informing them of the latest development of the KL suit, that they would be appealing against the Court of Appeal decision dated 11 October 1999 to the Federal Court, and that an

application for stay had been filed. In their letter to Cunningham, the claimant enclosed copies of their earlier letters to Antah ie that dated 18 June 1998, 14 September 1998 and 22 September 1998 and 14 October 1999. Reference was also made to a meeting held on 12 October 1999 between the claimant's representatives and Antah's representative.

[185] On 22 October 1999 Rajinder Singh and Radin Alang Iskandar (a partner and a legal assistant respectively in the claimant's firm) met an officer of Cunningham. By separate letter dated 22 October 1999 to Antah and Cunningham, they were again updated as to the development of the KL Suit of the fact that TNB had paid the balance of the judgment sum of RM7,545,472.48 to the plaintiff's solicitors in the KL suit. Paragraph 2 of this letter states 'for notification purposes and for consolidating the information of the above matter as requested by your goodself, we provide herewith the relevant information which is based on your 'Claims Notification Guidelines.'

[186] On 2 November 1999 the claimant issued yet another letter to Cunningham, 'for notification purposes', pursuant to their 'Claims Notification Guidelines'.

[187] Cunningham responded vide letter dated 7 January 2000 stating that the claimant was in breach cll 5.1.2 and 5.3 of the policy and reserving all of their rights. Be that as it may, pursuant to cl 7.2, the claimant was requested to furnish to them a written explanation of the delay of two years two months in notifying them.

[188] On 17 January 2000 the Federal Court refused the application for leave to appeal against the dismissal of Court of Appeal dismissing the application to set aside judgment in default against TNB.

[189] On this same date, 17 January 2000, the claimant replied Cunningham's letter dated 7 January 2000. The claimant denied the allegation that they were guilty of delay. Reference was then made to their earlier letter dated 18 June 1998 to Antah's invitation to renew the policy upon the expiration of their first term of insurance. Antah had been notified of the status of the KL suit way back on 18 June 1998 when it became apparent that the matter may give rise to a potential claim. The claimant in this letter stated that the requirement of cll 5.1.2 and 5.2 of the policy was 'unintentionally overlooked', 'without any mischievous intent' and the delay in notifying Cunningham only on 14 October 1999 be excused. The relevant documents were then forwarded to Cunningham for their record.

[190] On 9 February 2000 TNB issued a letter of demand to the claimant demanding the sum of RM9,740,720.48 being the judgment sum paid to the plaintiff in the KL suit. The claimant then made a claim for the same against the insurers.

[191] On 13 July 2000 the claimant was informed via Antah that the limit of indemnity they were entitled to was RM2m, ie that current at the time the claimant first became aware of circumstances which gave rise to the claim which is, during the first term of the policy (18 June 1998), not RM7m, the increased indemnity limit. Cunningham excused the delay in notifying them as the claimant had informed Antah when they had first become aware of TNB's claim.

[192] The claimant took issue and claimed that they were entitled to an indemnity limit RM7m and not RM2m. By reason of this dispute on the indemnity payable, vide letter dated 10 October 2000 to Antah and Cunningham, the claimant invoked general condition 5.9 of the policy to refer the dispute to arbitration.

[193] The appellant then commenced arbitration proceedings and cited eight insurance companies who participated in the second period as respondents claiming that they were entitled to a coverage of RM7m under the second term of the insurance policy.

THE ARBITRATION

[194] Based on the oral evidence and perusal of the relevant documents the arbitrator was of the opinion that there must be a final judgment before the requirement to notify the insurers under the policy arose. The arbitrator's finding was that the claimant's letter dated 18 June 1998 was a letter for the purpose of renewal and premium payable for an increment of indemnity and not a notification under cl 5.1.2.

[195] He took into consideration the fact that the policy in issue was a 'claims-made' policy and not an 'occurrence-based' policy. The arbitrator then held that the notification of claim was made on 2 November 1999 and thereafter made the following award:

> Having regard to all the circumstances in the present dispute, it is my finding that the claimant are entitled, on the basis of 'claims-made' policy and in the context of conditions 5.1.3 of the insurance policy to an indemnity for RM7m under the third policy period, together with costs of the arbitration.

[196] The eight insurance companies cited in the arbitration proceedings vide KL High Court OS No R2–25–216 of 2003 applied to set aside the arbitrator's award. The claimant, vide KL High Court OS R2–24–07 of 2004, applied to enforce the arbitrator's award against the three insurers who participated in the scheme during the third period.

THE HIGH COURT JUDGE'S DECISION

[197] The judge held that the arbitrator had misconstrued cll 5.1.1, 5.1.2 and 5.1.3 of the insurance policy. Clause 5.1 is the clause which dictates when a claim is to be made. The judge's finding was that the letter dated 18 June 1998 was a notice within the ambit of cl 5.1.2. That letter had set out the circumstances which the claimant expected would give rise to a claim being made against them. The judge's finding was that this letter dated 18 June 1998 gave rise to a 'claim first made during the period of insurance' under the first term of insurance (1 July 1997 to 30 June 1998). From the correspondence exchanged between the period 18 June 1998 and 17 January 2000, the High Court judge held that the arbitrator had erred in finding that the letter dated 18 June 1998 was not intended to be such a notification as the letter itself stated that it was a notice to the insurers of the claim by TNB.

[198] Further, even if the letter dated 18 June 1998 was not a notice within the meaning of the terms of the policy by reason of it being addressed to Antah and not Cunningham, the judge was of the opinion the arbitrator had also erred in finding that parties cannot by consent treat an irregular notification as good notice as the requirement of notice, being a contractual requirement, may be waived, if the parties consent to waive its compliance.

[199] These errors, according to the learned judge, constitutes errors of law on the face of the record. She then allowed the insurers' application to set aside the arbitrator's award. She then held that the claimant were entitled to an indemnity of RM2m under the first term of the policy. Consequently, the claimant's application to enforce the arbitrator's award was dismissed. Hence these appeals.

DECISION

[200] I am of the view that the High Court judge was right in arriving at her findings and decision which she did.

[201] At common law an appellate court will not, generally speaking, intervene and set aside an award unless there is an error in law on the face of the record.

[202] Section 24(2) of the Arbitration Act 1952 confers jurisdiction upon the High Court to set aside an award for misconduct by an arbitrator. 'Misconduct' in this context is used in its technical sense as denoting irregularity and not moral turpitude. It includes any irregularity which is not consonant with general principles of equity and good conscience. Failure to analyse and appraise the evidence does not vitiate the award on ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated (see *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211).

[203] The claimant named as respondents in the arbitration proceedings the eight insurers who participated in the second period alleging that they were liable to pay them RM7m under the policy for the second term of insurance. The essential duty of the arbitrator was therefore to arbitrate whether all eight insurers cited, or only some of them, were liable to pay the amount claimed.

[204] I am in agreement with the High Court judge that the claimant's letter dated 18 June 1998 addressed to Antah was not merely intended as a renewal of the insurance policy and an application for an increased indemnity from RM2m to RM7m, but was clearly intended to be a notification of a claim which the claimant had reason to expect may give rise to a claim against them. There was detailed information regarding, inter alia, the progress of the KL suit, of their application to set aside the default judgment, and payment having been made by TNB towards the judgment sum. This letter dated 18 June 1998 was intended to be a notification under cl 5.2 mistaking the role of Antah (as insurance brokers) and that of Cunningham (as loss adjusters). That was clearly necessary for the purpose of full and frank disclosure in the claimant's application for renewal of the policy, and in respect of their application for increased indemnity.

[205] I am of the view that the learned judge's finding that the arbitrator had failed to analyse and appraise evidence that were material and relevant had gone to affect the award, in particular, general conditions 5.1, 5.1.2 and 5.1.3 of the policy, the claimant's letters dated 18 June 1998, read with letters dated 2 November 1999 and 17 January 2000, as well as the insurer's letters dated 7 January 2000, 13 July 2000 and 30 June 2000. The arbitrator clearly did not appreciate these evidence and cl 7.1 of the policy dealing with 'Innocent Non-disclosure'. The contemporaneous documents to the events shows that the claimant, by reason of the delay in notification, was concerned as to the possibility of the insurers refusing cover which they were contractually entitled to do. On the facts of this case the insurers had accepted the claimant's explanation of having made a genuine mistake in not

informing Cunningham within the time prescribed. It was because the claimant had issued the letter dated 18 June 1998 in terms which they did to Antah, the insurers did not refuse cover and accepted liability. The contemporaneous letters clearly shows that there was consent by both parties to treat the irregular notice to Antah as good notice. The arbitrator's finding that parties cannot by consent treat an irregular notice as good notice is clearly a flawed construction of the terms of the policy and the law of contract in general constituting 'misconduct' on the part of the arbitrator.

[206] The award of the arbitrator for RM7m appears to be in respect of the policy under the third term of insurance (1 July 1999 to 31 December 2000) which had three insurers. In making the award which he did, it would appear that he had exonerated five of the insurers who did not participate in the scheme in the third period but had failed to award them costs. This demonstrates an 'irregularity of action which is not consonant with the general principles of equity and good conscience'. This also constitutes an error of law appearing on the face of the record entitling the award to be set aside.

[207] I am of the view that the High Court judge was right in concluding that the arbitrator had committed errors of law on the face of the record and in setting aside the award and in finding that the claimant is entitled to an indemnity of RM2m under the first term of insurance.

[208] On my part, I dismissed both appeals with costs. The decision of the High Court judge is affirmed. The deposit to the respondents.

Appeals allowed with costs here and below.

Reported by Ashgar Ali Ali Mohamed